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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 196

VITO GENOVESE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

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TABLE OF CONTENTS

	Page
I. The Government's Concession of Error	3
II. The Ground Upon Which the Government Now Seeks to Sustain the Judgment Was Abandoned in the Court of Appeals	5
III. The Ground Upon Which the Government Now Seeks to Sustain the Judgment Is Without Merit	13
A. The 61 Pages of Notes	14
B. The 24 Pages of Notes Dated October 10 and 11, 1957	22
C. The Legal Test of Harmless Error Under the Jencks Act	27
IV. A New Trial Is Required Under Brady v. Maryland	31
V. Destruction of Government Agents' Interview Notes Prejudiced Petitioner	32
A. Agent Consoli's Notes	32
B. Agent Muglia's Notes	33
C. Agent Rowan's Notes	34
VI. Shaw's Notes Are Relevant to the Remaining Grounds of the New Trial Motion	36
Conclusion	37

CASES:

Abel v. *United States*, 362 U.S. 217 (1960) 13
Brady v. *Maryland*, 373 U.S. 83 (1963) 2, 31
Campbell v. *United States* (*Campbell* I), 365 U.S. 85 (1961) 2, 12, 32
Campbell v. *United States*, 373 U.S. 487 (1963) 2, 4, 32
Clancy v. *United States*, 365 U.S. 312 (1961) 28, 29
Jencks v. *United States*, 353 U.S. 657 (1957) 29, 30
Killian v. *United States*, 368 U.S. 231 (1961) 27

Page

Kyle v. *United States*, 297 F. 2d 507 (2d Cir. 1961) . . 9, 10, 30
Palermo v. *United States*, 360 U.S. 343 (1959) 11
Rosenberg v. *United States*, 360 U.S. 367 (1959) . . 5, 7, 10, 14, 27, 28, 29, 30
Scales v. *United States*, 367 U.S. 203 (1961) 28
Scott v. *Armstrong*, 146 U.S. 499 (1892) 13
State of Ohio ex rel. Seney v. *Swift and Co.*, 260 U.S. 146 (1922) 13
United States v. *Aviles*, 274 F. 2d 179 (2d Cir. 1960) .. 23
United States v. *Consolidated Laundries Corp.*, 291 F. 2d 563 (2d Cir. 1961) 9, 12

STATUTE:

18 U.S.C. § 3500 ..... 2, 4, 6, 10, 11, 28, 32, 33, 34, 36

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The government's argument, in response to the six questions presented in this petitioner's Petition for Certiorari, may be summarized as follows:

(1) On the first question, the government has acknowledged error by the court of appeals (Br. Opp. 36).[1] The government concedes that the court of ap-

[1] The Brief in Opposition will be cited herein as "Br. Opp.". This petitioner's Petition for Certiorari will be cited "Pet.". Record references will be cited in the same manner employed in the petition (Pet. 5, n. 1). The additional references "G.J." and "G. App." will be used in the same manner as in the Brief in Opposition (Br. Opp. 2, n. 1).

For reasons appearing in the text, *infra*, extensive reference will be made to the briefs filed by petitioner and respondent in the court below. These will be cited as "Pet. CA Br.", "Gov. CA Br.", and "Pet. CA Reply Br.". Copies of these briefs were lodged with the Clerk of this Court upon the filing of the petition for certiorari (Pet. 12). Nine additional copies of petitioner's brief below are being lodged herewith.

peals' finding that the Shaw notes were not producible under the Jencks Act cannot stand. However, the government urges that the judgment be sustained on a different ground, that deprivation of the notes was non-prejudicial (Br. Opp. 36-46), although, as will be shown below, the government abandoned that ground in the court of appeals.

(2) and (3) In view of its concession with regard to question 1, that the court of appeals erred in holding the Shaw notes not within 18 U.S.C. § 3500, the government finds it unnecessary to discuss questions 2 and 3 of the petition, which seek review of the appellate court's narrow definition of "substantially verbatim" statements under § 3500(e)(2) (Br. Opp. 36).

(4) The Brief in Opposition is silent upon the issue raised by question 4 of the petition, namely, whether the prosecution's suppression of notes producible under the Jencks Act constitutes a due process violation under *Brady* v. *Maryland*, 373 U.S. 83 (1963).

(5) The government opposes review of the issue presented by question 5 of the petition, and previously left open by this Court in the *Campbell* cases: whether pre-trial destruction of a government agent's interview notes constitutes a violation of Jencks Act rights in the case of (a) good faith destruction and (b) bad faith destruction. *Campbell* v. *United States* (*Campbell* I), 365 U.S. 85, 98 (1961); *Campbell* v. *United States*, 373 U.S. 487, 491 (1963). The government takes the position that the destruction entailed no prejudice, since "The defense received reports embodying the notes . . . which were destroyed after the reports were prepared." (Br. Opp. 48.)

(6) The issue raised by question 6 of the petition is answered only in a footnote (Br. Opp. 33, n. 21).

Petitioner's contention that, on remand, the previously withheld Shaw notes should be considered as evidence on the remaining grounds of the new trial motion, is met by the contention: "We show, *infra,* that the Shaw notes are neither newly discovered nor significant." (*Ibid.*) However, the discussion "*infra*" never considers the significance of the Shaw notes in relation to the evidence on the new trial motion, but only in regard to the trial and grand jury testimony.

In view of the government's concession—if not confession—of error as to the sole ground upon which it prevailed in the court of appeals, petitioner submits that the grant of certiorari is plainly warranted. This reply brief will deal largely with the alternative ground upon which the government now seeks to sustain the judgment, namely that the wrongful failure to produce Shaw's notes under the Jencks Act did not prejudice the defendants. Petitioner will seek to demonstrate that this ground is so tenuous, and so at variance with the government's position on the same point in the court of appeals, that summary reversal may be appropriate.

I. THE GOVERNMENT'S CONCESSION OF ERROR

The government recognizes that, "The major complaint of all petitioners arises from the fact that the government at the trial did not turn over to the court the notes taken by Assistant United States Attorney Shaw." (Br. Opp. 33-34.) The sole basis upon which the court of appeals rejected this principal contention of petitioners was that Shaw's notes contained no statements producible under the Jencks Act (Pet. 9a-11a). The appellate court expressly rejected Judge

Murphy's contrary findings and made a *de novo* determination "with respect to this factual issue" (Pet. 9a).

The government now concedes that the court of appeals' decision of this issue was erroneous.

> "Under the ruling of this Court in *Campbell* v. *United States,* No. 631, O.T., 1962, decided May 27, 1963, we accept Judge Murphy's findings that the Shaw notes should have been produced under 18 U.S.C. 3500." (Br. Opp. 36.)

The government thus accepts the contention made in support of granting certiorari on the first of the questions presented: that the court of appeals improperly rejected the district court's findings that defendants were deprived of notes producible under the Jencks Act, 18 U.S.C. § 3500(e)(2) (Pet. 16-22).

The government suggests that, by accepting Judge Murphy's findings that the Shaw notes were producible under § 3500, it has rendered unnecessary a consideration of whether the court of appeals erroneously reviewed those findings (Br. Opp. 36). But in a striking *non sequitur* to its concession of error, the government urges that certiorari to correct the error be *denied,* and the erroneous precedent thus left to stand. Petitioner submits that the concession plainly warrants a grant of certiorari, since it removes the only basis upon which the government prevailed below.

Moreover, it seems singularly inappropriate for the government to ask this Court, as the sole basis for denying certiorari, to pass upon a contention as to lack of prejudice which the government never briefed or argued below—and which rests upon analysis and comparison of some 75 items in the Shaw notes, and more than 250 record citations (see Br. Opp. 37-46). Such

a basis for sustaining the judgment should be considered, if at all, only upon reaching the merits, not upon opposition to certiorari. However, in petitioner's view, the grant of certiorari may not call for plenary examination of the government's contention on the merits, but for summary reversal. Petitioner urges summary reversal on two bases: (1) the government's failure to urge below the sole ground upon which it now seeks to sustain the judgment; (2) such ground's demonstrable lack of merit. These points are developed in Parts II and III,[2] respectively, of this reply brief.

II. THE GROUND UPON WHICH THE GOVERNMENT NOW SEEKS TO SUSTAIN THE JUDGMENT WAS ABANDONED IN THE COURT OF APPEALS

If the government's elaborate argument on harmless error (Br. Opp. 36-46) possesses any merit, it is plainly one that should have been presented to the court of appeals—and to Judge Murphy in the district court. Yet it is made here for the first time, and in conflict with the government's position in the court of appeals.

In briefing before Judge Murphy the several grounds upon which it relied in opposing the new trial motion,

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[2] The argument in Part III might appropriately be deferred until consideration of the merits. However, unlike the government's task of showing that there was *no* prejudicial error—which requires an examination of all of the Shaw notes, and a comparison of each item with allegedly like information in other documents—petitioner can refute the government's position by instancing merely a few situations in the record in which items from the Shaw notes contained impeachment material not otherwise available. Under *Rosenberg* v. *United States*, 360 U.S. 367 (1959), discussed in Part III-C, *infra*, the erroneous withholding of Jencks statements may be deemed harmless error only where the defense has received "the same information" from other sources.

the government did not set forth the harmless error ground upon which it now relies.[3] Judge Murphy, however, rejected the grounds upon which the government did rely, and denied the motion on the ground that defendants had not been prejudiced by the wrongful withholding of Shaw's notes (see Pet. 11-12, 5a-6a). This ruling by Judge Murphy was made without benefit of argument by either side as to the contents of the notes. No such argument could have been made by petitioner, since defense counsel had not yet been allowed to see the notes (see Pet. 13, n. 10). The government, which had access to the notes, for reasons best known to itself did not attempt to demonstrate any alleged similarity between their contents and other materials furnished to the defense. Nevertheless, the legal

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[3] The government's brief before Judge Murphy concluded:

> "In conclusion it is respectfully submitted that petitioners' motion for a new trial must be denied, without a further hearing, on any one of the following independent grounds: (1) that no request was made at trial for the production of the Assistant United States Attorney's notes or chronology; (2) that there is no 'newly *discovered*' evidence presented by petitioners on the newly *alleged* non-production of the attorney's notes; (3) that petitioners have failed to exercise diligence in obtaining the 'new' evidence, and in raising the issue of non-production; (4) none of the notes or chronology constitute a 'substantially verbatim recital' of the witness' oral statements; and (5) it would be against the established policy of the law and the legislative history of § 3500 to allow the examination by opposing counsel of a lawyer's work product prepared to aid him in the conduct of his case." Brief in Opposition to Petitioners' Motion for a New Trial on the Ground of Newly Discovered Evidence, p. 58 (quoted in Pet. CA Reply Br. 2, n. 2; emphasis in original).

Similarly, at oral argument prior to filing of the above-quoted brief, the government did not argue harmless error (see 1771a).

conclusion that defendants were not prejudiced by the lack of Shaw's notes—reached without any hearing on what the notes contained—the government claims should be sustained unless "clearly erroneous" (Br. Opp. 36). Also remarkable is the government's threshhold contention, that the "clearly erroneous" standard of review (heretofore applied to factual findings) extends to "legal conclusions" (see *ibid.*).

In the court of appeals, as its opinion noted, petitioner directed his "major attack upon the order of Judge Murphy below" to "the issue of harmless error" —the sole issue concerning Shaw's notes upon which Judge Murphy had ruled against the defendants (Pet. 6a; see also Pet. 12). Petitioner's appellate brief pointed out in detail the manner in which the suppressed notes differed from Cantellops' grand jury testimony and impeached his trial testimony (Pet. CA Br. 66-95, 37-59). Petitioner also contended that Judge Murphy had applied an erroneous test of prejudice, instead of that adopted by this Court in *Rosenberg* v. *United States*, 360 U.S. 367 (1959) (Pet. CA Br 16-37, 60-65). ***But the government's 99-page brief below was silent upon the harmless error issue.*** The government disputed neither petitioner's contention that Judge Murphy had applied an erroneous standard of harmless error, nor his contention that the record showed sufficient prejudice to meet both the standard adopted by Judge Murphy and that of *Rosenberg* v. *United States*. This failure to reply was also noted in the petition for certiorari (Pet. 12), and supported by lodging copies of the appellate briefs filed by petitioner and the government (see n. 1, *supra*). A comparison of those briefs makes patent that the government deliberately declined to defend Judge Murphy's

ruling on the harmless error issue—the very ruling which it now contends "was in fact clearly correct" (Br. Opp. 36).

The silence of the government's brief was repeated at the oral argument. It was broken only when government counsel was pressed by the court, at the close of his argument, to state whether he would defend Judge Murphy's ruling. Government counsel then conceded that, in his view, Judge Murphy was "wrong" in everything but the result he reached. Court reporter's transcript of oral argument (lodged with this Court) at 120-22.[4] Orally, as in brief, government counsel de-

[4] The full colloquy on the point is as follows, between the court and government counsel, Arnold N. Enker, then Chief of the Appellate Section in the office of the United States Attorney for the Southern District of New York:

"JUDGE WATERMAN: Judge Marshall and I have interrupted with some questions and your hour is almost up, and I will give you some more minutes. But I do think probably it would be a little more orderly if I ask is somebody going to defend Judge Murphy? Unfortunately until now we have argument by Mr. Williams attacking Judge Murphy's decision and argument by you attacking Judge Murphy's decision. Nobody has supported Judge Murphy.

MR. ENKER: There is one problem with Judge Murphy's decision, your Honor, and that is that I think under the Kyle case, even under the Consolidated Laundries case, the standard to be applied to the question of prejudice would be a varying standard depending upon the nature of the wrongdoing by the Government counsel, assuming there to be some wrongdoing. If there were no wrongdoing, we don't reach the issue of prejudice.

Judge Murphy seemed to assume Government counsel committed wrong in not turning over the statements. He applied this very liberal standard of prejudice. I think that problem has to be decided by your Honors on the basis of your understanding of what the nature of the Government counsel's response to the request

fended Judge Murphy's result only by attacking his rulings that the Shaw notes were within the Jencks Act and should have been turned over to the trial judge (*id.* at 82-111; Gov. CA Br. 9-34). But in the event that the Shaw notes were held producible to the defense, counsel acknowledged that their withholding would

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was. If Government counsel committed a wrong, acted improperly, withholding something, suppressed something of any materiality, that would suffice and we would have no argument. Clearly there is a difference.

JUDGE WATERMAN: In other words, there is prejudice?

MR. ENKER: I am not saying there was prejudice unless Government counsel had done something improper; some improper act to warrant application of the very strict standard. The standard of Consolidated Laundries I don't think would be applicable to this case. Consolidated Laundries is a unique case. There is a maxim that hard cases make bad law. There were a lot of other issues in the case that are left undecided in the opinion and the opinion reserved on those grounds.

JUDGE WATERMAN: Do I understand you if Mr. Shaw's notes ought to have been turned over for an examination in camera by the trial judge and they were not, there was prejudice?

MR. ENKER: No. First of all, the preliminary question is should they have even been turned over to the judge.

JUDGE WATERMAN: So Judge Murphy was wrong all the way?

MR. ENKER: Yes.

JUDGE MARSHALL: Judge Murphy continued to be wrong but the result was wrong?

MR. ENKER: No, that is the only thing I agree with him on. . . ." Court reporter's transcript of oral argument at 120-22.

The cases referred to in the quoted passage are *United States* v. *Consolidated Laundries Corp.*, 291 F. 2d 563 (2d Cir. 1961) and *Kyle* v. *United States*, 297 F. 2d 507 (2d Cir. 1961).

be prejudicial if it had been due to the government's wrongdoing.

> "MR. ENKER: * * * Judge Murphy seemed to assume Government counsel committed wrong in not turning over the statements. . . . *If Government counsel committed a wrong,* acted improperly, withholding something, suppressed something of any materiality, that would suffice and we would have no argument. . . .
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> JUDGE WATERMAN: In other words, there is prejudice?
>
> MR. ENKER: I am not saying there was prejudice *unless Government counsel had done something improper;* some improper act to warrant application of the very strict standard.[5] . . ." Court reporter's transcript of oral argument, at 120-21 (emphasis supplied).

In this Court, however, the government concedes both the producibility of the notes and the governmental impropriety in their non-production. Thus it accepts "Judge Murphy's findings that the Shaw notes should have been produced under 18 U.S.C. 3500." (Br. Opp. 36.) It further accepts, at least "for present purposes", that suppression of Shaw's notes was due to "wrongful or negligent non-production on the part of the government" (Br. Opp. 35; *compare* Pet. 11a, n. 3, 13a; 200 F. Supp. at 714). The concession at

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[5] The "very strict standard" to which counsel referred is the *Rosenberg* test of harmless error for Jencks violations, as stated by the court below in *Kyle* v. *United States*, 297 F. 2d 507, 514 (2d Cir. 1961). Counsel's reference to the "very liberal standard of prejudice" applied by Judge Murphy (n. 4, *supra*), means a standard which is liberal to the government, in contrast with the "very strict standard" which the government must meet under *Rosenberg*.

oral argument, that the prejudice ruling was unsupportable *if* the government had wrongfully withheld notes producible under §3500, should therefore be applied.

Nor is the government convincing in its attempt to mitigate the wrongfulness of the conduct involved. The Brief in Opposition, in conceding that the withholding of Shaw's notes is to be deemed wrongful "for present purposes", adds:

> "[I]t is only fair to the attorney involved[6] to point out that the instant trial was concluded in April 1959, before the decision of this Court in *Palermo* v. *United States*, 360 U.S. 343, at a time when the term 'substantially verbatim' was thought to mean the equivalent of a stenographic recording." (Br. Opp. 35.)

This explanation is untenable in light of the trial court's rulings on the definition of "substantially verbatim" statements. Judge Bicks expressly rejected the argument of the United States Attorney at trial that statements must be stenographic in nature in order to qualify as "substantially verbatim" (Tr. 2049-55). Rather, Judge Bicks ruled, a statement was producible under the Act if it "set forth in substance what the witness said" (200 F. Supp. at 714-15; Tr. 2021, 2031, 2032, 2046). It is apparent from a mere inspection of the excerpts from agents' reports held "substantially verbatim" by Judge Bicks at trial (R. 1a-16a) that such excerpts were not "the equivalent of a steno-

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[6] It is not clear to whom "the attorney involved" refers—Assistant United States Attorney Shaw, who had taken the notes, or the United States Attorney and other Assistants who represented the government at trial when the notes were withheld.

graphic recording" of Cantellops' statements; indeed they were far less stenographic in nature than most of Shaw's contemporaneous interview notes (1829a-1913a). The government's present explanation for withholding Shaw's notes is also at variance with its suggested explanation in the court of appeals (Gov. CA Br. 19-20): that government counsel had not turned over Shaw's notes to the trial judge because they did not consider notes taken by an Assistant United States Attorney within either the statute or the defense request for "any report or memorandum prepared by a Government agent" (G. App. 1a-2a). The claim that Assistant United States Attorneys are not "government agents" was rejected by the court of appeals as a "game of verbal jackstraws" (Pet. 7a).

Neither attempted explanation for withholding the notes has any support in the record. Nor was either explanation offered at the hearing in the district court where, unlike on appeal, the government was represented by two of the three counsel who had appeared for the government at trial (125a; Tr. 64a). At the district court hearing, government counsel did not even offer a representation as to the reason for the notes' non-production, let alone adduce evidence on the point. The reason for withholding of the notes being peculiarly within the government's knowledge, it had the burden of proof in explaining their non-production. See *Campbell* I, 365 U.S. 85, 96 (1961). In the instant case the government made no attempt to sustain its burden. *Compare United States* v. *Consolidated Laundries Corp.*, 291 F.2d 563 (2d Cir. 1961): there too a motion for new trial was predicated upon newly discovered evidence of the government's failure to produce documents containing impeachment material, but the gov-

ernment assiduously (if unsuccessfully) attempted to prove that the non-production was not attributable to its fault.

Petitioner submits, in short, that the government's alternative ground for sustaining the judgment should not be entertained, since it was not advanced below, and also conflicts with the government's position in the court appeals.

> "Generally, at least, suitors may not maintain a position here which conflicts with that taken below. . . ." *State of Ohio ex rel. Seney* v. *Swift and Co.*, 260 U.S. 146, 149 (1922).

Compare Scott v. *Armstrong*, 146 U.S. 499, 512-13 (1892), where the Court reversed a judgment rather than sustain it upon a ground not passed upon below. See also *Abel* v. *United States*, 362 U.S. 217, 230 (1960), where the Court refused to pass upon a possible ground for reversal because petitioner's contention not only "was not made below; indeed, it was expressly disavowed." The same may be said of the respondent's contention here.

III THE GROUND UPON WHICH THE GOVERNMENT NOW SEEKS TO SUSTAIN THE JUDGMENT IS WITHOUT MERIT

The government's argument that the wrongful withholding of Shaw's notes did not prejudice the defense (Br. Opp. 36-46) considers first the 61 pages of notes which Judge Murphy held to correspond with the grand jury testimony, and then the 24 pages of notes dated October 10 and 11, 1957, which Judge Murphy did not find so to correspond. Petitioner will reply in the same order.

A. The 61 Pages of Notes

Petitioner, as previously noted, after securing from the court of appeals the right to inspect the 61 pages of notes (see Pet. 13, n. 10), demonstrated in his brief in the court of appeals 61 respects in which there were discrepancies between these notes and the grand jury testimony (Pet. CA Br. 65-95). Petitioner's brief also demonstrated the potential use of the discrepancies for impeachment purposes (*ibid.*). A copy of this brief was lodged with this Court upon the filing of the petition for certiorari, and nine additional copies are being lodged with this reply brief. The government in this Court, as in the court below, has not disputed the discrepancies asserted by the petitioner. Here, however, the government has set forth 35 instances in which it claims that both "the grand jury testimony and the notes indicated" certain specified events (Br. Opp. 37-41).

Even assuming the correctness of the government's 35 comparisons between the notes and the grand jury minutes, it would avail the government nought. Under *Rosenberg*, the test rests not upon the respects in which the documents are similar but the respects in which they differ. The harmless error doctrine cannot successfully be invoked by the government unless the grand jury minutes contained "the same information", "the very same information", as the withheld Shaw notes. *Rosenberg* v. *United States*, 360 U.S. 367, 370-71.[7] Since the government has not contested here or below petitioner's showing of 61 instances in which the defense did not receive "the same information" from

[7] The harmless error test is further discussed in Part III-C, *infra*.

the minutes that was contained in the withheld notes, the 35 alleged similarities between notes and minutes still could not render the notes' withholding harmless.

But the foregoing assumption, that the government's 35 comparisons between notes and minutes are valid, cannot withstand analysis. The invalidity is not primarily due to errors in what the government states as to the contents of the respective documents—although such errors exist. It is due primarily to what the government's statements of the record omit. In most instances the government's comparisons are couched in such general terms that, while not inaccurate in themselves, they cloak the differences which a more specific comparison would reveal.

Both types of flaw in the government's comparisons may be illustrated by examination of one of the instances in which the minutes and notes allegedly recite the same version of an incident:

> "... that Cantellops thereafter met in a hotel room with Ormento, Mazzie, Santora and the Mexican, and the decision was made for Cantellops to pick up the narcotics again in Miami (G.J. 137-39; compare H. App. 1892-1894, 1907-1909); ..." (Br. Opp. 40.)

The government reads the record inaccurately in contending that Santora and Mazzie were present in both versions. While the minutes do list Santora as present (G.J. 137), Santora's name is crossed out in the notes (1909a). On the other hand, the notes list Mazzie ("Rocco") as present (1909a), while the minutes do not (see G.J. 137). Nor does the government, in its apparent attempt to show symmetry, allude to the notes' mention of an additional participant in the meet-

ing, who is not mentioned in the minutes: Evola ("Joe") (*compare* 1909a *with* G.J. 137). The government's comparison correctly states the outcome of the meeting: "the decision was made for Cantellops to pick up the narcotics again in Miami". But the government ignores the differences between the versions as to how that outcome was achieved. According to the grand jury testimony, the decision to use Miami was made at the suggestion of Santora (G.J. 137). But the notes cannot say this, since they do not show Santora present; instead they attribute the same suggestion to Evola (1909a).

Another illustration of the government's use of a generalized comparison to conceal specific differences between the two versions of an incident, is its statement that both the grand jury minutes and notes indicated

> ". . . that Acevedo, who had sold narcotics for Cantellops, discussed narcotics with him in a bar (G.J. 16-18; compare H. App. 1865); . . ." (Br. Opp. 38-39.)

While it is true that such a discussion is mentioned in both versions, they differ markedly regarding its content. Thus, according to the notes, Cantellops talked with Acevedo "for a long time" in the Capo Bar on Friday, April 12, 1957 (1865a); but before the grand jury Cantellops denied having "a long conversation" about narcotics at that time (G.J. 17-18). According to the notes, Cantellops utilized the occasion to recruit the co-conspirator Acevedo into the conspiracy; Cantellops "Asked him [Acevedo] if he wanted to work for me" (1865a). But Cantellops told the grand jury, "I didn't ask him to work for me . . . He start by himself . . . [b]ecause he knew all the junkies before I knew

them." (G.J. 17.) The government's statement that Acevedo "*had* sold narcotics for Cantellops" prior to the talk in the bar accurately recites only the grand jury version; it conflicts with the version in the Shaw notes. The marked differences between the versions recorded in the notes and minutes exist notwithstanding that Shaw took the notes only four days prior to the grand jury testimony (see Br. Opp. 37; G.J. 1; 1853a). Shaw testified that he used his interview notes in examining Cantellops before the grand jury (1640a). It seems apparent, from comparison between the passages cited by the government, that before the grand jury Shaw was asking leading questions in an effort to have Cantellops repeat the story contained in the notes, but that Cantellops would not give the same answers on the second occasion. Such a shift in Cantellops' story over a period of four days would obviously have impeached his credibility at trial, where he claimed accurate recollection of dealings three and four years before.

A further example of the manner in which a general comparison fails to reveal a small but significant difference is the government's statement that the notes and minutes both indicated

> ". . . that Cantellops thereafter purchased narcotics regularly from Ralph Polizzano during 1956 (G.J. 7; compare H. App. 1859, 1861); . . ." (Br. Opp. 38.)

Although "regularly" may be a technically accurate adverb to describe the frequency of Cantellops' purchases in both versions, the minutes state that Cantellops "Often" purchased narcotics from Ralph Polizzano for the two or three months preceding September

11, 1956 (G.J. 7), while the notes are more precise. They specify that, from about July 30, 1956 until September, 1956, Cantellops would pick up one to three ounces of narcotics from Ralph Polizzano "every other day" (1861a). The greater precision found in the notes would have made them valuable to this petitioner for impeachment purposes. Most of Genovese's alleged conspiratorial activity was placed by Cantellops in August or the beginning of September, 1956 (see Pet. 9). The statement that Cantellops had seen Ralph Polizzano "every other day" during this period is utterly inconsistent with the frenetic schedule of activities, including trips to Miami and Puerto Rico, which Cantellops testified at trial that he had performed during August and early September of 1956 (Tr. 296a-362a).

A further example, particularly affecting this petitioner, of the government's deceptively general comparisons, is the one stating that both the minutes and the notes indicated

> ". . . that Cantellops, while in the company of Ormento and others,[8] had seen Genovese in a restaurant on the east side (G.J. 118; compare H. App. 1908); . . ." (Br. Opp. 40.)

This is the only one of the government's comparisons in which the petitioner Genovese is named. By placing the incident "in a restaurant on the east side", the government apparently overlooks that at trial the

[8] The generalization "and others" leaves unrevealed the discrepancy as to who the "others" were. According to the grand jury testimony, they were Santora, Mazzie ("Rocco") and the Mexican (G.J. 118). In the notes, however, Santora's name is crossed out and the name of Evola is added (1907a).

precise location of the restaurant presented a key issue as to the credibility of Cantellops' testimony against Genovese. The indictment and the bill of particulars had differed over the restaurant's location, the former describing it as "a bar at 96th Street, in New York City, New York", the latter as a "Bar and restaurant on south side of 86th St. between 2d & 3rd Avenues" (33a, 38a). The indictment version was obviously based on Cantellops' grand jury testimony describing the restaurant as "a restaurant in 96th, Italian[9] restaurant on the east side." (G.J. 118; see also G.J. 244.) At trial Cantellops testified in accordance with the bill of particulars' version of the restaurant's location (see Tr. 301a-02a, 336a-37a, 582a-88a). Cantellops claimed at trial that there had been a "mistake" in the street number, which he had corrected some months before. He testified that, since there was in fact no such restaurant on 96th Street, he must have mistakenly used the number 9 instead of 8 when he told the United States Attorney and the narcotics agents that the restaurant was on 96th (see Tr. 3424-32, Tr. 610a). The Shaw notes, unlike the minutes, would have refuted this explanation, as a result of the notes' greater specificity. The notes placed the restaurant not merely on East 96th Street (as the minutes did), but specifically "Between Park and 3d Avenue. Street has a slope towards 3d Avenue." (1908a.) This description of the topography, the defense could have shown—indeed a New York City jury would almost certainly have known—accurately describes 96th Street between Park and 3d Avenues, but is manifestly inapplicable to 86th Street between 2d and 3d, the location claimed in the bill of particulars and at trial. Cantellops' explanation that

[9] In the notes the restaurant is described as German (1908a).

he had merely made "an honest mistake in the number" of the street (Tr. 3424) would thus have been discredited; he would hardly have mistaken the 96th Street hill.

The limited space here available precludes the multiplication of examples of discrepancies, unrevealed by the government's comparisons, between the grand jury minutes and 61 pages of Shaw notes. For further examples of discrepancies, if these be deemed necessary at this juncture, the Court is respectfully referred to the detailed analysis contained in the lodged copies of the brief of this petitioner in the court of appeals (Pet. CA Br. 65-95).

Petitioner contends that the withholding of these notes cannot reasonably be deemed harmless error as to him. As shown in the petition, the evidence of petitioner's membership in the conspiracy consisted solely of Cantellops' uncorroborated testimony as to four occasions on which he had allegedly observed Genovese (Pet. 8-9). The above-cited description in the notes of the restaurant's location would have impeached Cantellops' testimony as to the third and fourth of these occasions. The third occasion took place in the restaurant itself (Tr. 302a-03a); the fourth followed a rendezvous which was arranged when Cantellops' party stopped at the same restaurant (Tr. 336a-37a). The testimony concerning the third occasion would have been further discredited by the discrepancy between the notes and trial testimony as to the immediately succeeding event. According to Cantellops' trial testimony, he and his party proceeded from the restaurant encounter with Genovese to a hotel room where the defendant Santora was waiting and a meeting then took place (Tr. 302a-03a). But, as pointed out above (p.

15), the notes contradict the minutes' claim that Santora was at the hotel. The testimony concerning the fourth occasion would have been further impeached by the notes' statement that Cantellops had seen Evola ("Joe") only three times: once in a hotel on 85th Street and twice in the park (1913a). At trial Cantellops testified that he had also seen Evola on the last of the occasions when he encountered Genovese, *i.e.*, en route to and at the meeting at defendant Mazzie's house in the Bronx (Tr. 336a, 343a, 351a). Cantellops even cited specific remarks which Evola allegedly made at the meeting (Tr. 347a, 349a). The credibility of the testimony placing Genovese at the meeting would hardly have survived a showing that Evola was not there.

The notes would also have detracted, as the grand jury minutes did not, from Cantellops' trial testimony as to the first two occasions on which he allegedly saw Genovese. On both occasions Genovese was allegedly with Carmine Polizzano (although Cantellops later admitted at the new trial hearing that one of the occasions did not occur; see Pet. 8-9). The incriminating character of these meetings for Genovese derived from Carmine Polizzano's alleged prior participation in the conspiracy. Cantellops' testimony involved Carmine Polizzano in the original formation of the conspiracy, by ascribing to him an active role in the conspirators' first two overt acts: the planning and execution of the Las Vegas narcotics delivery (see 30a-31a; Tr. 176a-77a, 183a-88a, 193a). The grand jury minutes likewise involved Carmine Polizzano in these events (see G.J. 32-38, 41-42). But the notes in no way involved Carmine Polizzano in the Las Vegas venture; the only co-conspirator whom they implicate in this venture is Barcelona (see 1868a-80a). The government, in recit-

ing instances in which these notes and the grand jury testimony as to the Las Vegas trip were similar, significantly mentions only Barcelona's activities (see Br. Opp. 39). It thus ignores the crucial distinction between the versions in the notes and in the minutes: that the former involved only Barcelona, while the latter added Carmine Polizzano and other alleged members of the conspiracy.

In short, the 61 pages of notes included information, not revealed by the government's comparisons, which besides discrediting Cantellops generally, would have directly or indirectly impeached all of his limited testimony against Genovese. Accordingly, the withholding of the notes was not harmless to petitioner, but plainly prejudicial.

B. The 24 Pages of Notes Dated October 10 and 11, 1957

In discussing the October 10 and 11 notes, the government again ignores the showing of numerous conflicts between the notes and trial testimony made in petitioner's brief below (Pet. CA Br. 37-59). Thus, for example, the ten-page discussion below of the many respects in which the October notes would impeach Cantellops' trial testimony concerning the Las Vegas trip (Pet. CA Br. 38-48) is not met by any attempt on the government's part to reconcile the notes with the trial testimony. Instead, the Brief in Opposition merely recites a few respects in which other materials on the Las Vegas trip assertedly contained the same version as the notes (Br. Opp. 43-44), and so presumably would render the notes without additional impeachment value. In order to fashion the comparison, however, the documents' contents are stated in terms so general that they would also apply to the very trial

testimony which the more specific statements in the notes impeach.[10]

With regard to the Las Vegas trip, the government also cites certain respects in which it concedes that the notes contained information not otherwise available to the defense (Br. Opp. 45). It claims that these represent "The only significant area of the notes which petitioners did not already possess in one form or another . . . ." (*Ibid.*) However, from a reading of the government's concession, the most fundamental difference between the notes and the other materials would hardly appear. That difference is that the story as recorded in the notes implicates none of the defendants or alleged co-conspirators (besides Cantellops himself). According to the October notes, the Las Vegas trip was made by Cantellops at the behest of one "Conrad De la Cruz", who is not named in the indictment. Delivery was made at the Las Vegas end to an unnamed person, without the assistance of any defendant. (1829a-33a.) Thus the entire basis of Cantellops' claim that he entered into a conspiracy with these defendants at the time of the Las Vegas trip in March of 1955 (see Tr. 165a-200a; *United States* v. *Aviles*, 274 F.2d 179, 182-83 (2d Cir.

[10] *E.g.*, the Brief in Opposition states that Cantellops "left the New York area on a flight to Los Angles" (Br. Opp. 43). "The New York area" is apparently meant to include both Newark and Idlewild, thus avoiding the conflict between the notes' statement that Cantellops left from Idlewild and the trial testimony that he left from Newark (*compare* 1830a and 1837a *with* Tr. 2378-80). Besides the notes, none of the materials cited in the government's comparison give Idlewild as the place of departure, while two of the cited reports give Newark (2059a, 2061a). The only materials furnished the defense at trial thus were consistent with Cantellops' version on the stand, while the withheld notes would have impeached it.

1960)), would be discredited by the October notes. The discrediting of the Las Vegas trip would also discredit the balance of Cantellops' story. For this was the only one of Cantellops' ten trips as to which there was any corroboration that he was present in the city claimed at the approximate date claimed (Tr. 5050-55; Gov. Exs. 53, 101, 102); and the United States Attorney in summation urged that this corroboration showed that the defense attack on the credibility of Cantellops' other testimony should be rejected (Tr. 6756, 6780-81).

The notes' omission of Carmine Polizzano's alleged role in the Las Vegas trip is of considerable importance to this petitioner. For, as noted above, the impeachment of Cantellops' trial testimony involving Carmine Polizzano in the conspiracy redounds to Genovese's benefit by undermining the significance of Genovese's alleged meetings with Carmine Polizzano—meetings which allegedly occurred on the first two of the four occasions that Cantellops saw Genovese (see Pet. 8-9). The notes' version of the Las Vegas trip would also assist this petitioner by contradicting Cantellops' testimony before the grand and petit juries, that he became involved in the trip and in the conspiracy through his efforts to borrow money to finance his invention of a crooked gambling device (G.J. 31-35; Tr. 165a-81a). The government claimed at trial that

> "[T]his gambling device . . . is a thread which runs through a great deal of this testimony . . . it was discussed with many of the defendants by this witness during the course of the conspiracy . . . ." (Tr. 166a-67a.)

Cantellops claimed that his introduction to "the Right Man" (allegedly Genovese) was promised by Gigante

as a result of Cantellops' telling Gigante that his gambling invention would be a better investment for the conspirators than narcotics (Tr. 292a). Thereafter, in Gigante's presence, when Cantellops allegedly was introduced to Genovese, he was told to explain his invention to Genovese and, when he did so, Genovese indicated that Cantellops could finance a sample of the invention through his activities in the narcotics conspiracy (Tr. 338a-40a). The impeachment of Cantellops' story of the gambling invention would thus have snipped the very thread by which he bound Genovese to the conspiracy.

Judge Murphy found that, "The October notes contained materially false versions of two of Cantellops' trips, one to Las Vegas and one to Miami . . . ." 200 F. Supp. at 716. The Brief in Opposition gives no basis for rejecting this finding as to either trip. With regard to the Miami trip—and in contrast to the concession regarding the Las Vegas trip that there was a "significant area of the notes which petitioners did not already possess" (Br. Opp. 45)—the government maintains that "Only insignificant details of the Miami trip were not in the other documents petitioners were given." (Br. Opp. 43.) But in the ensuing list of such "details", the government overlooks the most fundamental of the differences revealed by the notes alone.[11] The notes placed this trip to Miami and Tampa in the early part of March, 1957, following Cantellops' release from prison in February, 1957 (see 1834a, 1838a-44a). However, the trial testimony placed the Miami-Tampa trip in June of 1955 (see Tr. 205a, 206a-08a),

[11] An extensive discussion of the differences between the trial testimony and the October notes concerning the Miami-Tampa trip appears in Pet. CA Br. 52-57.

as did the grand jury testimony (see G.J. 45, 48, 51-52).[12] The question and answer statement taken by Shaw on October 10, 1957, which was given to the defense, significantly fails to specify the year of the Miami-Tampa trip (see 2051a).

The critical importance of placing the Miami-Tampa trip in March of 1957, instead of June of 1955, is that the former version impeaches Cantellops' trial testimony as to all the events in the intervening period. Cantellops' trial testimony places his trips and other conspiratorial activities in careful chronological sequence (ending with his arrest on July 1, 1957, Tr. 392a-93a), and the majority of these activities were subsequent to the Miami-Tampa trip. If that trip was not until March of 1957, then Cantellops' account of the activities placed during the two preceding years is discredited. This is of particular significance to the petitioner Genovese, since all of his alleged contacts with Cantellops were placed by the latter in 1956 (see Pet. 8-9).

In short, the government has not refuted, or even attempted to refute, petitioner's showing below (reiterated at Pet. 12) that the October notes contained material directly impeaching nine of the twenty-seven episodes to which Cantellops had testified at trial, partially impeaching three others, and indirectly impeach-

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[12] The government misreads the grand jury testimony when it cites "G.J. 183, 186" as stating "that Cantellops picked up narcotics in an old suitcase *in Tampa*" (Br. Opp. 42, emphasis supplied). The cited testimony relates to receiving luggage in Key West (G.J. 183) and at the Lido Hotel in Miami (G.J. 186). The trip which Cantellops was then discussing did not include Tampa at all (see G.J. 183-87). Moreover, Cantellops elsewhere told the grand jury that the Lido Hotel incident was not connected with the Tampa trip (G.J. 52).

ing the remainder by the fatal discrepancy as to the year of the Miami-Tampa trip. Nor has the government shown that the trial testimony concerning these episodes was equally impeached by the other materials which the government cites.[13] Had the October notes been available at trial, Cantellops' testimony concerning both this petitioner's connection with the alleged conspiracy, and the very formation and existence of such conspiracy, would have been seriously discredited.

C. The Legal Test of Harmless Error Under the Jencks Act

Where the erroneous ruling of a trial judge has deprived the defense of material producible under the Jencks Act, the test of harmless error applied by this Court is whether the defendant at trial received "the same information," "the very same information," that was contained in the withheld material. *Rosenberg* v. *United States*, 360 U.S. 367, 370-71 (1959). The *Rosenberg* test was followed and quoted with approval in *Killian* v. *United States*, 368 U.S. 231, 243-44 (1961). On the other hand, where the same information was not received by the defense, this Court has declined to permit speculation as to the extent of its impeaching effect.

> "Since the production of at least some of the statements withheld was a right of the defense, it is

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[13] The government seeks to minimize the impeaching effect of the October 1957 notes by citing grand jury testimony of June 25, 1958 (G.J. 232-33) in which Cantellops assertedly claimed that fear had prevented him from implicating Genovese and Gigante sooner (Br. Opp. 45-46). This argument has two flaws. First, Cantellops did not repeat the claim before the petit jury, and the grand jury testimony in question was not before them (see Tr. 2732-33). Second, such testimony did not name Genovese, who was not mentioned in any of Cantellops' testimony of June 25 (G.J. 230-41).

> not for us to speculate whether they could have been utilized effectively." *Clancy* v. *United States*, 365 U.S. 312, 316 (1961).

See also *Scales* v. *United States*, 367 U.S. 203, 258 (1961) ("Once this question [whether statements are producible under § 3500] has been determined, whether the statements may be useful for purposes of impeachment is a decision which rests, of course, with the defendant himself").

The government plainly has not demonstrated that petitioner received "the very same information" in other materials that was contained in Cantellops' statements to Shaw. Even accepting its argument at face value, the government has claimed with regard to the 61 pages of notes only that "*Almost* their entire substance was contained in Cantellops' . . . grand jury testimony" (Br. Opp. 37, emphasis supplied). With regard to the October 1957 notes, it has acknowledged in regard to the Las Vegas trip that there is a "significant area of the notes which petitioners did not already possess in one form or another" (Br. Opp. 45). In addition, what the government styles "Only insignificant details of the Miami trip" concededly "were not in the other documents petitioners were given." (Br. Opp. 43.) Thus, even without considering petitioner's analysis of the record in Parts III-A and III-B, *supra*, it is plain from the government's own reading of the record that it is asking this Court to indulge in the very speculation held impermissible in *Clancy*, *supra*.

Judge Murphy's ruling, that withholding of the October notes was non-prejudicial, likewise rests not upon "the same information" test of *Rosenberg*, but on the

speculation prohibited by *Clancy*. The government does not appear to contend that Judge Murphy found complete correspondence between the October notes and other materials furnished to the defense. Rather, the government's description of his holding is that,

> "As to the notes of October 10 and 11, he concluded that denial of access *did not influence the result*." (Br. Opp. 37, emphasis supplied.)

This outcome-determinative test is a fundamental departure from the *Rosenberg* standard, and plainly contrary to *Clancy*. It is in conflict with the basic principle of the *Jencks* case, that the defense rather than the court must assess the effect of confronting a witness with his prior statement. In *Jencks* the majority rejected the view of the concurring opinion, that the case should be remanded for the district judge's consideration of whether denial of the statements affected the verdict. See *Jencks* v. *United States*, 353 U.S. 657, 678 (1957) (concurring opinion).

In ruling on the 61 pages of non-October notes, Judge Murphy apparently accepted the *Rosenberg* test. See 200 F. Supp. at 715. But, since the defense had not as yet been permitted to see the notes, Judge Murphy was not apprised of the significant respects in which these differed both from the grand jury and trial testimony (see Pet. CA Br. 65-95). His opinion mentions no differences at all. The inadequacy of Judge Murphy's ruling in this respect is inherent in the very rationale of the *Jencks* case itself:

> "Because only the defense is adequately equipped to determine the effective use [of statements] for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the

defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less." *Jencks* v. *United States, supra,* at 668-69.

Finally, the government seems to imply that it is entitled to a more favorable standard of harmless error because the non-production of the notes first came to light upon a new trial motion (see Br. Opp. 34). But the government's suggestion is paradoxical. It would allow the government to receive a more favorable standard of review because the withholding of the notes was not, as in *Rosenberg,* due to an erroneous ruling of the trial judge, but was due instead to wrongful action on the government's part at trial. If, as petitioner contends, denial of the Shaw notes would not have been held harmless error under the *Rosenberg* standard on direct appeal,[14] the error is hardly rendered harmless by the government's suppression of the notes until Shaw testified on the new trial motion, or by petitioner's intervening years of imprisonment under the judgment obtained at trial.

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[14] If anything, the standard should be stricter than in *Rosenberg* when, as here, the withheld Jencks statements would impeach the sole witness against petitioner. In *Rosenberg,* by contrast, the statement erroneously denied was not that of the principal witness, but of a witness whose testimony did not even mention the accused. See 360 U.S. at 373-74 (dissenting opinion). Defense counsel had even stated to the jury that he did not question the accuracy of that witness' testimony, a point which the government stressed in this Court. See Brief for the United States, pp. 65-67, *Rosenberg* v. *United States, supra.*

Moreover, as the court below has observed, the government should be subject to a stricter test of harmless error where the deprivation of impeaching material is due to misconduct of the prosecution. See *Kyle* v. *United States,* 297 F.2d 507, 512-15 (2d Cir 1961).

IV. A NEW TRIAL IS REQUIRED UNDER BRADY V. MARYLAND

The Brief in Opposition does not even discuss the constitutional issue arising under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and presented by the fourth of the questions in the petition. Yet the applicability of *Brady* would undermine the government's entire argument on harmless error, for it requires a new trial as a matter of due process where the government has suppressed any requested [15] favorable evidence on any material issue. Even the government does not appear to contend that the Shaw notes did not contain information "favorable to" petitioner which the jury might have considered on a "material" issue. On the contrary, the government expressly acknowledges that one "area of the notes" was "significant" (Br. Opp. 45). Moreover, the government has conceded "for present purposes" that its withholding of the notes must be treated as "wrongful or negligent" (Br. Opp. 35). The case thus is brought squarely within the *Brady* holding:

> "[T]hat the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963).

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[15] In the instant case, the government's contention that the defendants had not requested the Shaw materials which were suppressed was rejected by the court below as a "game of verbal jackstraws" (Pet. 7a).

V. DESTRUCTION OF GOVERNMENT AGENTS' INTERVIEW NOTES PREJUDICED PETITIONER

The Brief in Opposition does not gainsay that the destruction of notes issue—previously left open by this Court in the *Campbell* cases [16]—is an issue of general importance. Rather, the government suggests that it should not be reviewed in this case (where it is presented by the fifth question in the petition), because the destruction assertedly did not deprive the defendants of impeachment material. The government's contention is that the notes which were destroyed were embodied in reports received by the defense (Br. Opp. 48). But the record does not support this contention.

A. Agent Consoli's Notes

The short answer to the government's contention that the reports received by the defense "contained lengthier and more detailed recitals of everything contained in the notes" of agent Consoli (Br. Opp. 46), is that the defense received only those portions of the Consoli reports which the trial court found to contain "substantially verbatim" statements of Cantellops (Tr. 2030-39). Such statements qualified for production under *subsection (e)(2)* of § 3500. But Consoli testified at the new trial hearing that it was his practice to read portions of the interview notes back to Cantellops to make sure that they were accurate (872a-73a; see also 860a, 865a, Br. Opp. 28). The interview notes thus approved by Cantellops would qualify under *subsection (e)(1)*, as interpreted in the second *Campbell* case, 373 487, 492 (1963). The destruction of Consoli's notes therefore denied to the defense statements of the wit-

[16] *Campbell* v. *United States* (*Campbell I*), 365 U.S. 85, 98 (1961); *Campbell* v. *United States*, 373 U.S. 487, 491 (1963).

ness producible under subsection (e)(1), even if it be assumed that Consoli's reports had included all statements in the notes which qualified under subsection (e)(2).

B. Agent Muglia's Notes

The government similarly contends that the defense received at trial "The reports which were prepared from the notes" of agent Muglia (Br. Opp. 46). In summarizing the testimony to support this conclusion, the government states:

> "Agent Muglia testified that he interviewed Cantellops on *two* occasions, and that he took notes of those interviews, recording the highlights of the pertinent data obtained from Cantellops (H. App. 1357-1359)." (Br. Opp. 29; emphasis supplied.)

The government further states:

> "Muglia prepared *reports of these interviews,* and the reports reflected the notes (H. App. 1358, 1359, 1360-1361, 1362, 1383)." (*Ibid.;* emphasis supplied.)

The significant point overlooked by the government is that at trial one of these two interview reports was denied to the defense, because Muglia then testified that he did not receive the information in that report from Cantellops (Tr. 2044). Assuming the hearing testimony cited by the Brief in Opposition to be truthful, Muglia must have testified erroneously at the trial in denying that the second report contained information which he had received from Cantellops. As a result of the pre-trial destruction of Muglia's interview notes, the defense thus was deprived not only of the Jencks statements contained in the notes, but also of the opportunity of showing that the second report was based

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on interview notes and thus itself producible insofar as it qualified under § 3500 (e)(2).

C. Agent Rowan's Notes

The government ignores the question raised by the petition (Pet. 42-43) as to whether the government had the burden of proving that the destruction of agent Rowan's notes was in good faith. Apparently the government considers that the issue need not be reached because of its contention that Rowan's notes, like the other agents', were embodied in reports, portions of which were turned over to the defense (see Br. Opp. 48). But it is apparent from a mere examination of the four brief excerpts which the defense received from Rowan's reports, containing a total of 10 sentences (R. 13a-16a), that these cannot plausibly have included most or all of the contents of those Rowan interview notes which Shaw conceded having in his possession (see Pet. 41 and n. 27).[17]

Nor can the government claim that Rowan would have had no more notes than the other agents because they were "similarly situated" (Br. Opp. 48). For both Shaw and Rowan's superiors in the Narcotics Bureau testified that Rowan had the most extensive role of all the agents working on the case (see 1492a, 1499a-1501a, 1580a, 1627a). A month prior to return of the indictment, warrants of arrest were issued for 32 of the 37 defendants solely on the basis of sworn complaints by Rowan, in which he stated that the source of his information was "investigations made by him in the course

[17] Moreover, Shaw saw only those notes which Rowan took before Shaw was relieved from the case about April, 1957. Rowan continued on the case through the return of the indictment in July, 1957.

of his official duties." (Record on appeal, pp. 7724-7872; *cf.* Tr. 926a-27a.) It is inconceivable that such investigations yielded notes no more extensive than the 10 sentences from reports received by the defense.

Rowan's destruction of his notes, without incorporating their contents in his reports, was highly prejudicial to petitioner. *E.g.*, Genovese was first implicated by Cantellops only as the result of Rowan's investigation revealing a fatal discrepancy in one aspect of Cantellops' story (1249a-66a, 1510a-11a). Rowan destroyed his notes on this matter (1249a), and it was not mentioned in any of the four reports received by the defense (R. 13a-16a). Again, petitioner was prejudiced by the absence from Rowan's notes of Cantellops' attempted identification of the various places involved in the testimony concerning Genovese, including the east side restaurant discussed above. Cantellops testified that Rowan was the only narcotics agent who accompanied him when the identifications were made (Tr. 592-93a, 609a, 764-65a). But there was a critical conflict between Cantellops' testimony that he had given Rowan definite identifications of the places in question and the representation by the United States attorney that it was not possible to specify precise locations in the bill of particulars because Cantellops had made no positive identification (Tr. 817a-26a). The conflict remained unresolved, because the United States Attorney advised the court that agent Rowan was unavailable and that there was no written report of Rowan on the matter (Tr. 590a-91a).

VI. SHAW'S NOTES ARE RELEVANT TO THE REMAINING GROUNDS OF THE NEW TRIAL MOTION

The government takes note of the contention raised in the sixth question of the petition, that Shaw's notes should be considered on remand as further evidence on the other grounds of the new trial motion (Br. Opp. 33, n. 21). However, the government thereafter refrains from discussing the relation of the notes to the other grounds of the motion.

Now that the government has conceded the qualification of the notes under § 3500 (Br. Opp. 36), they plainly should be admissible on remand to support petitioner's case on the other grounds. *E.g.*, one item in Shaw's notes would do much to refute Cantellops' testimony at the new trial hearing—accepted by Judge Bicks on the then existing record—that the material in the recantations to Siegal was the product of Siegal's suggestion, not of Cantellops' own knowledge (see 183a-214a; 197 F. Supp. at 543; Br. Opp. 10-11). The Shaw notes, unlike the grand jury or trial testimony, mentioned that at the time of Cantellops' second visit to the "Mexican's" hotel room on 85th Street, the "Mexican's" wife was no longer there but was living at the "Colonial Hotel" (1909a; see also 1893a). In the July 20 recantation to Siegal, Cantellops stated that in his trial testimony he had fabricated meetings in a park by the Planetarium, adjacent to 81st Street and Columbus Avenue; he told Siegal that he fabricated the meetings because he used to see the "Mexican" in that park when the latter came there to see if he could make up with his wife, who had moved from the "Mexican's" hotel to a hotel facing this park (see 1939a, 437a; Tr. 310a-19a, 331a-32a). The Manhattan telephone directory lists the address of the "Colonial Hotel" as 51

West 81st Street, *i.e.*, at 81st Street and Columbus Avenue facing the park described by Cantellops. Shaw's notes thus corroborate the recantation, and show that Cantellops rather than Siegal was its author. For Siegal could have learned only from Cantellops the information in the then unrevealed Shaw notes, that the "Mexican's" wife had moved to the Colonial Hotel.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted; it is further submitted that the judgment should be reversed summarily and the case remanded for a new trial.

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